179

(2)

No. 10-696

Supreme Court, U.S.
FILED
DEC 29 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MONICA JOHNSON,

Petitioner,

v.

CITY OF MEMPHIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

*HENRY L. KLEIN
APPERSON CRUMP PLC
6070 Poplar Avenue
Sixth Floor
Memphis, TN 38119
Telephone: (901) 756-6300
hklein@appersoncrump.com

**Counsel of Record*

BARBARALETTE G. DAVIS
ASSISTANT CITY ATTORNEY
Office of City Attorney
125 North Main Street, Room 336
Memphis, TN 38103

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether the Sixth Circuit Court of Appeals correctly held that the Petitioner was not entitled to amend her Complaint to add state law claims?

II. Whether the Sixth Circuit Court of Appeals' ruling implicates an important federal question that has not been settled by this Court?

III. Whether there are other compelling reasons to deny Petitioner's Motion to Amend her state court claims, in addition to the ruling by the Sixth Circuit Court of Appeals?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
I. Facts Relevant to the Petition	1
II. Procedural History and Opinions Below	3
ARGUMENT	5
I. The District Court And The Court Of Appeals Correctly Found That Petitioner Was Not Entitled To Amend Her Complaint Based Upon Newly Discovered Evidence	5
II. The Ruling Of The Sixth Circuit Court Of Appeals Does Not Implicate An Important Federal Question Which Has Not Been Settled By This Court	10
III. There Are Other Compelling Reasons To Deny Petitioner's Motion To Amend Her State Court Claims In Addition To The Ruling By The Sixth Circuit Court Of Appeals	11
A. The record does not support a claim based upon newly discovered evidence	11
B. By consenting to the dismissal of the state court claims, Petitioner abandoned her right to amend	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Doyle v. Frost, 49 S.W.3d 853 (Tenn. 2001).....7

Ezell v. Cockrell, 902 S.W.2d 394 (Tenn. 1995).....9

Hawks v. City of Westmoreland, 960 S.W.2d 10 (Tenn. 1947).....7

Lucius v. City of Memphis, 925 S.W.2d 522 (Tenn. 1996).....7

Lynn v. City of Jackson, 63 S.W.3d 332 (Tenn. 2001).....7, 8

State of Louisiana v. Litton Mortgage Company, 50 F.3d 1298 (5th Cir. 1995) 12

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1257(a).....1

Tenn. Code Ann. § 20-5-107.....5

Tenn. Code Ann. § 20-5-113.....6

Tenn. Code Ann. § 20-6-106.....5

Tenn. Code Ann. § 29-20-101.....7

Tenn. Code Ann. § 29-20-101, *et seq.*.....5

Tenn. Code Ann. § 29-20-102(4).....9

Tenn. Code Ann. § 29-20-201.....8

Tenn. Code Ann. § 29-20-201(c).....9

Tenn. Code Ann. § 29-20-205(2).....5

Tenn. Code Ann. § 29-20-407.....7

TABLE OF AUTHORITIES – Continued

Page

Tennessee Governmental Tort Liability Act (TGTLA) 5, 7, 9, 10

U.S. Const. amend. V 4

U.S. Const. amend. XIV 4

Tenn. Const. Art. I, § 17.....7

RULES

Supreme Court Rule 10 10

OTHER AUTHORITIES

Louis L. Jaffe, *Suits Against Governments And Officers: Sovereign Immunity*, 77 Harv.L.Rev. 1 (1963).....7

STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction on the court by Writ of *Certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

I. Facts Relevant To The Petition

On April 22, 2004, a "911" call was placed to the Memphis Police Department Communications Section by Petitioner, which was classified as a "hang call." The dispatcher contacted officers in the field advising a "hang call" had been received. Thereafter, a second call came in, at which time enough information was taken to classify the call as involving a "mental case" or "mental consumer." In the meantime, between calls, officers were dispatched to the scene and arrived to the home before the second call came in. Until the second call was received, the first call was considered a "hang call" with no information.

On the date in question, Memphis Police Officer Kenneth Adams and his partner at the time got a call from the dispatcher that there was a 911 hang-up call at 6119 Knights Bridge in an apartment complex. The officers had no further information other than the fact there was a call and they were being sent over to check out what was taking place.

Officer Melvin Rice, who also received the information, was riding in a separate car and arrived at the scene before Officer Adams. When Officer Adams arrived at the scene, Officer Rice acknowledged that he had made the scene and the patio door was open. Upon Officer Adams' arrival, he saw his partner standing in the middle of the house and he went inside. Upon entering, Officer Adams inquired as to what was going on and they decided to do a search of the apartment to make sure no one was hurt. As they started down the hallway, Officer Rice thought he saw a person come down the stairs and all of a sudden, Petitioner's husband, Xavier Johnson appeared before them. At that point, Mr. Johnson immediately jumped on Officer Rice. Once he grabbed Officer Rice, he had him in a "bear hug," at which time Officer Rice pushed him off with his forearm. Mr. Johnson hit the wall and as he came off the wall, he grabbed Officer Rice and they started struggling over Officer Rice's weapon. Officer Rice called out to Officer Adams that Mr. Johnson had gotten his gun. As the struggle continued, Officer Adams continuously hollered to Mr. Johnson to get down, and when Mr. Johnson refused, Officer Adams had a clear shot and fired one shot at him. After the first shot, Mr. Johnson continued to struggle and Officer Adams shot him again. After the second shot, Mr. Johnson moved Officer Rice out of the way and kept charging towards Officer Adams, who took a couple of steps back and kept hollering to Mr. Johnson to get down. Mr. Johnson kept charging toward him and Officer Adams fired additional shots. At that time, Mr. Johnson

lunged toward him and knocked him into the wall and into the patio door. Mr. Johnson fell to the floor at the feet of Officer Adams. Contact was made with City's Communications Section that a shooting had occurred. When paramedics arrived at the scene, Mr. Johnson was pronounced dead.

The officers later learned that Mr. Johnson was not ordinarily dangerous, but was bi-polar and was off his medication. Unfortunately, the information in Petitioner's second call did not reach the officers until it was too late.

II. Procedural History and Opinions Below

The original complaint for civil rights violation and violation of wrongful death was filed on May 18, 2004, by Petitioner on her own behalf and on behalf of her minor son. Following the filing of a Motion to Dismiss on behalf of Respondent City of Memphis (the "City"), the District Court entered an order granting in part the City's motion to dismiss Petitioner's claims against the Memphis Police Division. The court dismissed the claims alleging violations of Fifth, Fourteenth and Fifteenth Amendments, the request for punitive damages, and claims against the individual Defendants acting in their official capacities.

On December 1, 2004, Petitioner filed an amendment to the damages portion of the Complaint, and the City filed a second Motion to Dismiss reiterating that the City was not liable for punitive damages. An

order was again entered dismissing Petitioner's claim for punitive damages.

Thereafter, Petitioner filed a second Amended Complaint for civil rights violations and wrongful death regarding the failure of the City to properly utilize its Crisis Intervention Team at the time of the incident in question which it alleged ultimately resulted in the shooting death of Petitioner's husband. The City filed a Motion to Dismiss the second Amended Complaint and on February 6, 2006, a Consent Order was entered dismissing certain claims in Petitioner's second amended complaint, namely, claims pursuant to the Fifth and Fourteenth Amendments to the Constitution, claims pursuant to state law and the additional claims for punitive damages.

On August 15, 2007, Petitioner filed another Motion to Amend seeking a reinstatement of previously dismissed state law claims, alleging failure of the Memphis Police Department to adequately train its officers to respond to "911 hang-up calls."

On August 31, 2007, the City filed its Motion for Summary Judgment and memorandum in support thereof. Thereafter, an order was entered by the Court denying Petitioner's motion to reinstate the state court claims and granting the City's Motion for Summary Judgment.

On November 27, 2007, Petitioner filed a Motion for Reconsideration, which was denied and Petitioner filed a notice of appeal to the Sixth Circuit Court of Appeals.

On August 24, 2010, the Sixth Circuit Court of Appeals affirmed the District Court's ruling by concluding, among other things, that the District Court committed no error in denying Petitioner's Motion to Amend seeking reinstatement of her state court claims because the plain language of the Tennessee Governmental Tort Liability Act (TGTLA) preserves immunity for suits claiming negligent injuries arising out of civil rights violations. This Writ of *Certiorari* followed.

ARGUMENT

I. The District Court And The Court Of Appeals Correctly Found That Petitioner Was Not Entitled To Amend Her Complaint Based Upon Newly Discovered Evidence.

The essence of Petitioner's position is that the District Court and the Court of Appeals erred in finding that the Tennessee Governmental Tort Liability Act (TGTLA) was controlling since she had a separate independent cause of action pursuant to the Tennessee Wrongful Death Act.

The TGTLA is codified at Tenn. Code Ann. § 29-20-101, *et seq.* The specific section involved here is Tenn. Code Ann. § 29-20-205(2), which states, in pertinent part, as follows:

> Immunity from suit of all governmental entities is removed for injury proximately

> caused by a negligent act or omission or any employee within the scope of his employment, except if the injury arises out of:
>
> . . . .
>
> (2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights; . . .

Petitioner bases her right to proceed upon the Tennessee Wrongful Death Act which is found at Tenn. Code Ann. § 20-5-113, and states as follows:

> Where a person's death is caused by the wrongful act, fault, or omission of another, and suit is brought for damages, as provided for by §§ 20-5-106 and 20-5-107, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

The Petitioner's reliance upon the Tennessee Wrongful Death Act as conferring a separate cause of action under the facts of this case is misplaced. An action against a governmental entity, whether it is a claim for negligence pursuant to the Tennessee

Wrongful Death Act or otherwise, must be brought under the TGTLA. This is established by the Tennessee Supreme Court in *Doyle v. Frost*, 49 S.W.3d 853 (Tenn. 2001), wherein the court stated pertinently, as follows:

> The doctrine of sovereign immunity historically has been recognized as prohibiting suits against the State and governmental entities. *See Hawks v. City of Westmoreland*, 960 S.W.2d 10, 14 (Tenn. 1947); *see also* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv.L.Rev. 1 (1963). The doctrine has been acknowledged in Tennessee's common law for over a century and provides that "suit may not be brought against a governmental entity unless that governmental entity has consented to be sued." *Hawks,* 960 S.W.2d at 14 (citing *Lucius v. City of Memphis*, 925 S.W.2d 522, 525 (Tenn. 1996)); *see also* Tenn. Const. Art. I, § 17 ("Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."). Since 1973, claims against counties, municipalities, and other local governmental agencies have been governed by the GTLA. *See generally* Tenn.Code Ann. §§ 29-20-101 to 407 (2000).

Doyle v. Frost, 49 S.W.3d 853, 857 (Tenn. 2001). This doctrine is reinforced by the Tennessee Supreme Court in *Lynn v. City of Jackson,* 63 S.W.3d 332, 337 (Tenn. 2001). *Lynn* is particularly significant since it deals with a claim against the City of Jackson,

Tennessee pursuant to the Tennessee Wrongful Death Statute. The court discusses the Wrongful Death Statute and finds that its purpose is to provide for the continued existence and passing of the right of action of the deceased and not for any new, independent causes of action in survivors. *Id.* at 335. Basically, what the statute does is to provide for elements of damages consistent with the theory of the survival of the right of an action of the deceased. *Id.* at 335-36.

Tenn. Code Ann. § 29-20-201 confirms that the exclusive cause of action for wrongful death is pursuant to the TGTLA. It provides in part:

> (a) Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.
>
> (b)(1) The general assembly finds and declares that the services of governmental entity boards, commissions, authorities and other governing agencies are critical to the efficient conduct and management of the public affairs of the citizens of this state. Complete and absolute immunity is required for the free exercise and discharge of the duties of such boards, commissions, authorities and other governing agencies. Members of boards, commissions, authorities, and other governing agencies must be permitted to

> operate without concern for the possibility of litigation arising from the faithful discharge of their duties.
>
> . . . .

It should be noted that under the "Definitions" section of the TGTLA found at Tenn. Code Ann. § 29-20-102(4) injury is defined as follows:

> "Injury" means *death*, injury to a person, damage to or loss of property or any other injury that one may suffer to one's person, or estate, that would be actionable if inflicted by a private person or such person's agent. (Emphasis supplied by writer).

Since injury includes death, it is conclusive that any death action must be brought pursuant to the TGTLA. Furthermore, any claim for damages must be brought in strict compliance with the terms of the TGTLA. Tenn. Code Ann. § 29-20-201(c). In *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995), the Court held:

> The limited waiver of governmental immunity provided for in the Act is in clear derogation of the common law. Generally, statutes in derogation of the common law are to be strictly construed and confined to their express terms, and that rule of construction has been expressly incorporated into the Act. . . .

Id. at 399.

In such actions against governmental entities, the Tennessee courts have clearly stated that the

Tennessee Wrongful Death Act is subsumed by the TGTLA, which affords immunity to municipalities.

II. The Ruling Of The Sixth Circuit Court Of Appeals Does Not Implicate An Important Federal Question Which Has Not Been Settled By This Court.

The jurisdiction of the United States Supreme Court is governed by Supreme Court Rule 10. Pursuant to the applicable rule, review on a Writ of *Certiorari* is not a matter of right, but of judicial discretion. Thus, a Petition for Writ of *Certiorari* will be granted only for compelling reasons. None are present in this case. There are no constitutional or federal issues implicated here. Consequently, the criteria established by this Court for the granting of a Petition for Writ of *Certiorari* do not exist in this action.

What is involved in this action is an interpretation by the Tennessee Supreme Court of the application of a state statute enacted by the Tennessee Legislature. Petitioner does not challenge the constitutionality of the TGTLA and it is conceded that the Court of Appeals was correct in finding that the City has immunity for actions predicated upon civil rights. Whether the Tennessee Wrongful Death Statute should come into play is strictly a local matter and does not raise a federal question.

III. There Are Other Compelling Reasons To Deny Petitioner's Motion To Amend Her State Court Claims In Addition To The Ruling By The Sixth Circuit Court Of Appeals.

A. The record does not support a claim based upon newly discovered evidence.

Petitioner contends that new facts revealed by discovery support a claim for negligence under the Tennessee Wrongful Death Act. The record in the case is unavailing. The first call that came in was a "hang call" and contained no information. Based upon this call, the officers were dispatched to the scene. In the meantime, a second call came in which described the deceased as a mental consumer. However, by the time the second call came in, the officers were at the scene and were engaged with the decedent. Under this scenario, there is no negligence. Unfortunately, the information that the decedent was a mental consumer did not reach the officers until it was too late.

B. By consenting to the dismissal of the state court claims, Petitioner abandoned her right to amend.

By agreeing to dismiss the state court claims pursuant to a consent order entered on February 6, 2006, and then a year and a half later Petitioner sought to reopen these claims without raising any new issues, Petitioner has abandoned her right to reinstatement of her state court claims. In the original

complaint and the second amended complaint which tracks the original complaint, Petitioner alleged that the Communications dispatcher failed to send the Crisis Intervention Team to the scene on being advised of the decedent's mental instability which constitutes negligence. This is the same issue which the Petitioner sought to reopen after the consent order of dismissal. In *State of Louisiana v. Litton Mortgage Company*, 50 F.3d 1298, 1303-04 (5th Cir. 1995), the court discussed certain factors which constitute abandonment. These factors include numerous amendments and the failure of these amendments to raise new claims. In *Litton*, the court concluded that Plaintiff was not entitled to amend the complaint. The same factors are present in this case and, therefore, Petitioner herein has also abandoned her right to reinstatement of the state court claims. *Id.*

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition for Writ of *Certiorari* herein be denied.

Respectfully submitted,

HENRY L. KLEIN
Counsel of Record
APPERSON CRUMP PLC
6070 Poplar Avenue, Sixth Floor
Memphis, TN 38119
(901) 756-6300

BARBARALETTE G. DAVIS
ASSISTANT CITY ATTORNEY
Office of City Attorney
125 North Main Street,
Room 336
Memphis, TN 38103
(901) 576-6614

Counsel for Respondent